Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

DEBORAH KATZ PUESCHEL,
Petitioner,

v.

RODNEY E. SLATER, SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of this Court's pending decision in *Cleveland v. Policy Management Systems Corp., et al.* (No. 97-1008), the court of appeals' holding that petitioner is not entitled to accommodation under the Rehabilitation Act, 29 U.S.C. § 791 *et seq.*, because she had claimed she was disabled and applied for disability benefits under the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.*, should be reversed and remanded?

2. Whether, in light of this Court's pending decision in *Cleveland v. Policy Management Systems Corp., et al.* (No. 97-1008), the court of appeals' holding that petitioner is not "otherwise qualified for employement" under the Rehabilitation Act because of statements she made regarding her disability, should be reversed and remanded?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. THE COURT OF APPEALS' HOLDING THAT PETITIONER IS NOT "OTHERWISE QUALIFIED" BECAUSE SHE IS DISABLED IS CONTROLLED BY THIS COURT'S PENDING DECISION IN *CLEVELAND v. POLICY MANAGEMENT SYSTEMS CORP.*	7
II. PETITIONER'S ASSERTION IN APRIL 1994 THAT SHE WAS TOTALLY DISABLED IS NOT DISPOSITIVE OF HER CLAIM THAT SHE IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE REHABILITATION ACT AND THEREFORE ENTITLED TO REASONABLE ACCOMMODATION OF HER CONDITION	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page
Cleveland v. Policy Management Systems Corp. (U.S. No. 97-1008)	7
Johnson v. Oregon, 141 F.3d 1210 (9th Cir. 1998)	7
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)	3
Rascon v. US West Communications, Inc., 143 F.3d 1324 (10th Cir. 1998)	7
Weigel v. Target Stores, 122 F.3d 461 (7th Cir. 1997)	8
Regulations	
29 C.F.R. § 1614.203(g) (1994)	10
Statutes	
5 U.S.C. § 8101	8
5 U.S.C. § 8102(a)	8

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Deborah Katz Pueschel, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 18, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is unreported. The decision of the district court (Appendix B), issued from the bench, also is unreported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on February 18, 1999. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 501(b) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791(b), provides in pertinent part:

> Each department, agency, and instrumentality . . . in the executive branch shall . . . submit to the Office of Personnel Management and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicappd employees are being met. . . .

Regulations of the Equal Employment Opportunity Commission, 29 C.F.R. § 1614.203 (1994), provide in pertinent part:

> (a)(6) "Qualified individual with handicaps" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:
>
> > (i) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or
> >
> > (ii) meets the criteria for appointment under one of the special appointing authorities for individuals with handicaps.
>
> * * * *

(g) *Reassignment.* When a non-probationary employee becomes unable the essential functions of her position even with reasonable accommodation due to a handicap, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. § 8337 or 5 U.S.C. § 8451. . . .

STATEMENT OF THE CASE

At all times relevant to this case, petitioner was an Air Traffic Controller at the Washington Air Route Traffic Control Center, in Leesburg, Virginia, outside Washington, D.C. Petitioner's employer was the Federal Aviation Administration (FAA), an agency of the United States Government.

Petitioner was one of the first female Air Traffic Controllers at Leesburg. In 1979, she alleged that she had been the victim of a sustained pattern of sexual harassment by her male supervisors and colleagues. The United States Court of Appeals upheld her claim, holding that the sexually abusive language to which petitioner repeatedly had been subjected constituted a sexually hostile working environment. *Katz v. Dole,* 709 F.2d 251 (4th Cir. 1983).

The period following the court of appeals' decision was marked by continued hostility directed against petitioner at Leesburg, and she began to suffer physically. Over the years, petitioner has been diagnosed with asthma, sarcoidosis, pitting edema, and fibromyalgia. She nevertheless continued to work and uniformly received fully satisfactory performance evaluations.

In 1991, petitioner began to suffer from fatigue and edema; at the advice of the Mayo Clinic she consulted with an internist, who prescribed a fixed shift, 6 a.m. to 4 p.m. The FAA approved that shift, and petitioner remained on it through April 1994.

In late 1993, petitioner's supervisors and colleagues decided that her shift would be changed in two significant ways. First, instead of 6 a.m. to 4 p.m., her shift would be 8 a.m. to 6 p.m. This would have the effect of increasing the periods of heavy traffic for which petitioner would be responsible; the resulting increased stress on her was inconsistent with her treatment. The second change was to impose a Monday through Friday work week on petitioner, rather than the Wednesday through Sunday week she had previously been granted. Because traffic in the Washington area is lighter on weekends, this change would also have the effect of increasing traffic and stress.

Petitioner appealed to the FAA to allow her to retain the shift which enabled her to work, but the FAA refused. Faced with the prospect of having to work at a shift her doctors had told her would not be good for her, on April 5, 1994 petitioner broke down and left the facility.[1] She subsequently presented the FAA with an April 6, 1994 note from her doctor that said, "Due to physical and mental problems at the patient's employment, she is not

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[1] According to the court of appeals, petitioner suffered a "stress-related episode", which required her to leave work. App. A at 2a.

released for any work at this time and until further notice". App. G at 34a. In November 1995, petitioner's doctor modified his recommendation to state that petitioner was "disqualified . . . for an active position as an air traffic controller". *Id.* at 32a. In June 1997, when deposed in connection with this case, petitioner's doctor testified that petitioner was "capable of administrative work in any capacity". App. E at 31a.

Petitioner timely initiated an administrative complaint of discrimination in which she claimed, *inter alia*, that the FAA violated her rights under the Rehabilitation Act by failing to continue her special shift as an accommodation of her disabilities. When the FAA rejected the complaint, petitioner initiated the instant action.[3]

The district court granted summary judgment for respondent. With respect to petitioner's claim under the Rehabilitation Act, the district court held that petitioner "was not qualified for the position" based upon her doctor's statement in April 1994. App. B at 17a. The court noted that petitioner had filed a claim for disability benefits with the OWCP, and cited the apparent contradiction between her claim that she was disabled and her assertion under the Rehabilitation Act that she could work with accommodation, admonishing that "she can't have it both ways. That's not right". *Id.*

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2 Petitioner did not return to work under the conditions imposed upon her by the FAA, and she filed a claim for disability compensation with the federal Office of Worker Compensation Programs (OWCP), U.S. Department of Labor. On September 23, 1998, OWCP ruled that petitioner's absence from work after April 5, 1994 was due to disability caused by her employment. App. D at 27a.

3 Petitioner initially filed this action in the United States District Court for the District of Columbia. That court transferred to the case to the Eastern District of Virginia in 1997.

With respect to the change in petitioner's shift imposed by the FAA, the district court found that the new shift was "reasonable". *Id.* at 17a. While citing the testimony of one of petitioner's doctors that the two-hour difference in the shift appeared inconsequential, the district court ignored the testimony of petitioner's other doctor that petitioner's fibromyalgia "is worse with stress . . . [and] anything that increased stress would be more hazardous." App. E at 30a.

Petitioner appealed the grant of summary judgment to the Fourth Circuit, which affirmed the district court. With respect to petitioner's Rehabilitation Act claim, the court of appeals held as follows:

> It is uncontradicted that Pueschel's physician wrote on April 6, 1994 that until further notice, Pueschel's medical condition precluded her from working. Pueschel has not worked for the FAA since April 5, 1994, and has not provided the FAA with notice of her availability to work. The evidence establishes that at the time Pueschel brought the action and throughout the litigation, her illness precluded her from working as an Air Traffic Controller. Consequently, the Rehabilitation Act imposes no liability on the Department of Transportation. In short, she is not "otherwise qualified for employment." *DOE v. Univ. of MD. Med. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995); 29 C.F.R. § 1614.203(a)(6).

App. A at 5a.

Petitioner has timely petitioned for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT PETITIONER IS NOT "OTHERWISE QUALIFIED" BECAUSE SHE IS DISABLED IS CONTROLLED BY THIS COURT'S PENDING DECISION IN *CLEVELAND v. POLICY MANAGEMENT SYSTEMS CORP.*

The court of appeals held that petitioner is not entitled to the protections of the Rehabilitation Act because "her illness precluded her from working as an air traffic controller". App. A at 5a. The validity of that holding will be controlled by the Court's pending decision in *Cleveland v. Policy Management Systems Corp.* (No. 97-1008), which has been argued but not yet issued as of the date of this Petition.

The first question in *Cleveland* is whether an employee's application for disability benefits under the Social Security Act creates a rebuttable presumption that the employee is judicially estopped from claiming that she is a "qualified individual with a disability" under the Americans with Disabilities Act.[4]

The majority of courts of appeals have rejected the presumption that an employee's assertion of a disability under a benefits statute estops her from simultaneously claiming the protection of the ADA. *See, e.g., Rascon v. US West Communications, Inc.*, 143 F.3d 1324, 1330-32 (10th Cir. 1998); *Johnson v. Oregon*, 141 F.3d 1210, 1212 (9th Cir. 1998). These courts have recognized that the standards utilized by employment and benefits statutes

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[4] The second quesion in *Cleveland*, discussed *infra*, is, in the event a presumption is not created, the weight (if any) to be given to the employee's statements on the application regarding her disability if she also claims to the employer that she is a "qualified individual with a disability".

are different, and findings under one are not conclusive as to the other. *See Weigel v. Target Stores*, 122 F.3d 461, 468 (7th Cir. 1997) (claims for disability benefits under SSA are not "conclusive as to the ADA" qualification issue).

The identical reasoning applies in this case. The district court found that petitioner could not be "qualified" under the Rehabilitation Act because she had applied for disability benefits with OWCP.[5] According to the district court, petitioner "can't have it both ways. That's not right." App. B at 17a. The court of appeals did not reject that finding.

In fact, petitioner is permitted to argue to the OWCP that she is disabled because of factors related to her employment, while at the same time argue to her employer that she can work if her disability is accommodated. Indeed, the OWCP anticipated the argument and instructed petitioner to ask respondent "whether light or limited duty work is available" or "whether [her] usual job can be changed to meet [her] work limitations due to the injury". App. C at 21a. Thus, not only is petitioner not estopped from arguing that she is "otherwise qualified" to perform her duties, she is *required* to seek accommodation in the form of a modification of her duties in order to retain her eligibility for disability benefits.[6]

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[5] The Department of Labor's OWCP administers the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.* The purpose of the Act is to provide for "compensation . . . for the disability or death of a [federal] employee resulting from personal injury sustained while in the performance of his duty". *Id.* § 8102(a).

[6] Petitioner's request that she be permitted to retain her special shift in 1993 satisfied her obligation under both Acts. In any event, respondent never offered petitioner any "light or limited duty work", or any work she could perform.

In the event the Court holds in *Cleveland* that an employee's assertion of disability under a benefits statute does not estop her from arguing to her employer that she is capable of working with reasonable accommodation, the decision below should be reversed and the case remanded for further consideration.

II. PETITIONER'S ASSERTION IN APRIL 1994 THAT SHE WAS TOTALLY DISABLED IS NOT DISPOSITIVE OF HER CLAIM THAT SHE IS A "QUALIFIED INDIVIDUAL WITH A DISABLILTY" UNDER THE REHABILITATION ACT AND THEREFORE ENTITLED TO REASONABLE ACCOMMODATION OF HER CONDITION.

It is undisputed that on April 5, 1994, when petitioner learned that respondent was altering her shift in a manner inconsistent with her doctors' advice, petitioner suffered a "stress-related episode", App. A at 2a, and left work. The next day, petitioner submitted a note from her doctor stating that "due to physical and mental problems at her place of employment", petitioner was not capable of performing any work. App. G at 34a. Based on this statement, both the district court, App. B at 17a, and the court of appeals, App. A at 5a, held that petitioner could not claim the protection of the Rehabilitation Act because she is not "otherwise qualified" to work.

That holding will also be controlled by the pending decision in *Cleveland*. The court of appeals' decision in *Cleveland* held that the employee's statements in her application that she was totally disabled were dispositive of her subsequent assertion that she was qualified under the ADA and capable of working. The validity of that holding is one of the questions to be decided in *Cleveland*. For the same reasons that an employee's *application* for disability benefits cannot control her entitlement to relief

under the Rehabilitation Act or ADA, the employee's *statements* in support of her application cannot be dispositive of her status under those Acts.

This is particularly true in this case because the medical evidence cited by both the district court and the court of appeals demonstrated that the Rehabilitation Act applied to petitioner. While it is true that in April 1994, petitioner's doctor advised respondent that petitioner could not work at "any" job with respondent because of her "physical and mental condition", App. G at 34a, in November 1995, petitioner's doctor advised respondent that his limitation on petitioner's employment then extended only to her service in "an active position as an air traffic controller". *Id.* at 32a. Moreover, at his deposition in June 1997, cited to the district court and the court of appeals, the doctor testified in response to questioning by respondent that petitioner was fully capable of working in an administrative capacity. App. E at 31a.

The court of appeals erred when it relied on the doctor's assertion that petitioner could not work as an air traffic controller as dispositive of her entitlement to the protections of the Rehabilitation Act. The regulations of the Equal Employment Opportunity Commission require federal agencies to "offer to reassign" an employee to a position she can perform if she "becomes unable to perform the essential functions of her position even with reasonable accommodation". 29 C.F.R. § 1614.203(g).[7] It is hard to reconcile the court of appeals' finding that respondent cannot be liable under the Rehabilitation Act, with respondent's clear failure to comply with the Act's

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[7] This requirement is fully consistent with OWCP's requirement that the employer of a disabled federal employee "consider light or limited duty work". App. C at 21a.

requirement that it attempt to reassign petitioner to a position she could perform.

CONCLUSION

Petitioner requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2503

DEBORAH KATZ PUESCHEL,
Plaintiff-Appellant,

v.

RODNEY SLATER, SECRETARY,
DEPARTMENT OF TRANSPORTATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Robert E. Payne, District Judge.
(CA-97-148-A)

Argued: September 22, 1998
Decided: February 18, 1999

Before WILKINS and MICHAEL, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

OPINION

PER CURIAM:

Deborah Katz Pueschel appeals the district court's grant of summary judgment in favor of the Department of Transportation in her action alleging discrimination in violation of Title VII, 42 U.S.C.A. § 2000e et seq. (West 1994 & Supp. 1998) and the Rehabilitation Act, 29 U.S.C.A. § 791 et seq. (West 1999). We affirm.

I

The facts, very briefly put forth in the light most favorable to Pueschel, are these. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Pueschel, an air traffic controller employed by the Federal Aviation Administration (FAA), suffers from sarcoidosis and asthma, conditions made worse by stress. Pueschel has filed claims with the federal Office of Workers' Compensation Programs (OWCP) in connection with these ailments. Her condition further requires that she work a regular schedule, an arrangement not typically afforded to air traffic controllers. In 1993, a team of FAA and air traffic controllers' union representatives proposed that Pueschel change the hours of her shift. A discussion of her schedule induced a stress-related episode on April 5, 1994, requiring Pueschel to leave work. She has not worked at the FAA since.

II

Pueschel alleges that the FAA discriminated against her on the basis of her sex and disability in violation of Title VII and the Rehabilitation Act. More specifically, she alleges that her supervisor engaged in discriminatory behavior and that the FAA destroyed her personnel records; interfered with her OWCP claims; and discriminated against her by proposing to change her work schedule.

We review a grant of summary judgment de novo. *See Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 196 (4th Cir. 1997). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding whether there is a genuine issue of material fact and whether the Department of Transportation is entitled to judgment as a matter of law, Pueschel's evidence is to be believed, and all justifiable inferences are to be drawn in her favor. *See Anderson*, 477 U.S. at 255.

Before Pueschel can succeed in her Title VII action, the statute requires that she demonstrate that there has been discrimination in respect of a "personnel action." 42 U.S.C.A. § 2000e-16(a) (West Supp. 1998). We have defined a personnel action as an employment action that is ultimate in nature, such as hiring, firing, or promoting; contrasted are interlocutory or immediate decisions. *See Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981). The district court properly asked under *Page* whether an "adverse employment action" occurred, and held that the FAA had taken no such action.

At oral argument, Pueschel contended that the district court erred in applying *Page*, because of Supreme Court decisions that had not been announced at the time the district court ruled. In two Title VII decisions, the Supreme Court asked whether the employer took "tangible" employment action against the employee. *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257, 2265, 2268-69 (1998); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2293 (1998). "A tangible employment action constitutes

a significant change in employment status . . . ." *Burlington Industries*, 118 S.Ct. at 2268.

In Pueschel's case, the choice of nomenclature makes no material difference in outcome. The FAA's actions did not rise to the level contemplated by either *Burlington Industries* or *Page*. The evidence clearly indicates that Pueschel's personnel records were never destroyed. There is no indication that the FAA obstructed her ability to file claims with the OWCP, and no evidence that her supervisor discriminated against her. The FAA and her supervisor merely required Pueschel to document her claims. Finally, Pueschel concedes that her work schedule was still a matter of discussion between the FAA, the air traffic controllers' union, and herself. This unrealized proposal to Pueschel's work schedule was neither a significant change to her employment status, nor was it an adverse personnel action. *See Burlington Industries*, 118 S.Ct. at 2268; *Page*, 645 F.2d at 233. The FAA is entitled to summary judgment on the Title VII claim.

III

Pueschel also challenges the district court's grant of summary judgment on her Rehabilitation Act claim. In order to establish a prima facie violation of the Rehabilitation Act, Pueschel must prove: (1) that she has a disability; (2) that she is otherwise qualified for the employment or benefit in question; and (3) that she was excluded from the employment or benefit due to discrimination solely on the basis of the disability. *See Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995).

The district court assumed for summary judgment purposes that Pueschel's health condition constitutes a disability under the Rehabilitation Act, and without decid-

ing, we shall do the same. Pueschel contends that the district court erred in finding that she was not a qualified individual under the Rehabilitation Act. Equal Employment Opportunity Commission regulations define a "qualified individual with handicaps" as a person who, "with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . . ." 29 CFR § 1614.203(a)(6) (1997).

It is uncontradicted that Pueschel's physician wrote on April 6, 1994, that until further notice, Pueschel's medical condition precluded her from working. Pueschel has not worked for the FAA since April 5, 1994, and has not provided the FAA with notice of her availability to work. The evidence establishes that at the time Pueschel brought the action and throughout the litigation, her illness precluded her from working as an air traffic controller. Consequently, the Rehabilitation Act imposes no liability on the Department of Transportation. In short, she is not "otherwise qualified for employment." *Doe*, 50 F.3d at 1265; 29 CFR § 1614.203(a)(6).

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AEXANDRIA DIVISION

Civil Action No. 97-148-A

DEBORAH KATZ PUESCHEL,
Plaintiff,

vs.

RODNEY SLATER,
Secretary of Transportation,
Defendant.

Alexandria, Virginia
August 27, 1997

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

* * * *

[60] THE COURT: All right, thank you.

The complaint here recites essentially five constituent elements of claims that are alleged to be the basis for a discrimination claim under Title VII and Rehabilitation Act claims under the Rehabilitation Act. The first of those events is what is referred to in the papers here as claim No. 1, inclusion of medical information in the file

of the plaintiff, but that has been withdrawn, as it certainly should have been, because it was absolutely meritless to be in there in the first place.

There are two lines of attack with respect to the remaining claims. The remaining claims are the alleged destruction of plaintiff's records. The next one is the assignment of Mr. Becker as the plaintiff's supervisor. The next one is a shift assignment, and the final one is alleged obstruction of OWCP claims.

As to claim No. 2, the alleged destruction of plaintiff's records, claim No. 3, the assignment of Mr. Becker as plaintiff's supervisor, and claim No. 5, the obstruction of OWCP claims, the government seeks to have that dismissed under summary judgment for failure to satisfy the mandatory requirements of 29 C.F.R. Section 1614.05 (a)(1). It gets to a rule 56 posture [61] because it was articulated as a failure to state a claim issue under 12(b) —pursuant to Federal Rule of Civil Procedure 12(b)(6), but there was matter outside of the record which was added to that motion, and it therefore is to be treated as a motion under rule 56 for summary judgment.

Now the party seeking summary judgment bears the responsibility of informing the court of the basis for its motion and establishing on the basis of the record that there isn't any genuine issue of material fact and that that party is entitled to judgment as a matter of law. Once initial showing is made under rule 56(c), the burden of production but not persuasion moves to the non-moving party, and the non-moving party must go beyond the pleadings and by citing its own affidavits or depositions, pleadings, or evidence, must show there's a genuine issue for trial.

When the moving party has, in fact, carried its burden, the opponent has to do more than simply show there's

some metaphysical doubt as to the existence of material facts, and indeed, the mere existence of some alleged factual dispute doesn't defeat an otherwise properly supported motion for summary judgment, because the issue is whether there's a genuine issue of material fact, not just a dispute.

The non-moving party, of course, need only present evidence from which a jury might return a verdict in favor of the non-moving party, and if the non-moving party does that, then [62] there's no genuine issue—then there is a genuine issue of fact that necessitates a trial, and of course, it's not the responsibility of the district court to weigh the evidence, but to determine whether there's an issue for trial, and there is no issue for trial unless there's sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.

Hence, summary judgment is appropriate if the evidence is merely colorable or not significantly probative. And the evidence of the non-movant, of course, is to be believed, and all justifiable inferences have to be drawn in favor of the non-moving party.

Now with respect to the question of timeliness, the regulation here, 29 C.F.R. Section 1614.105(a), provides, and I quote, "Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, or handicap must consult a counselor prior to filing a complaint in order to try to informally resolve the matter." Subsection (1) of that section says, "An aggrieved person must initiate contact," that is, consult a counselor, must initiate contact "with a counselor within 45 days of the date of the matter alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action."

The government says that wasn't done here with respect to the alleged destruction of records, with respect to the [63] assignment of Mr. Becker as a supervisor, and with respect to the alleged mishandling or obstruction of the OWCP claims.

The fact is there is not any evidence in the record that shows that the existence of a contact within 45 days after October 30, when Ms. Pueschel was told that—October 30, 1993, was told that her records had been destroyed. However, there's an affidavit here in which she says she talked to Mr. Becker—I mean Mr. Yeck, excuse me, on November 1, 1993, and she says she talked to him with respect to not only the destruction of her records, but also with respect to the obstruction of the OWCP claims, which she contends was actually culminated in the destruction of the records referred to in claim No. 2.

Now if the jury were to believe her testimony, then she made a contact within the time period prescribed by 1614.105, so there is a material factual dispute with respect to the question of timeliness on the alleged destruction of the plaintiff's records and whether that was reported to a counselor within the time required by the regulation, as well as the obstruction of the OWCP claims.

The plaintiff has brought forward no evidence whatsoever to suggest remotely that she in any way complained of or raised that issue, the issue of Mr. Becker's assignment, in a timely fashion. He was appointed her supervisor in May of 1993, and she first complained about all of that on April 20, 1994, to the counselor, and I think that it's her responsibility to come [64] forward with something, and what's clear beyond any serious question here is that her reply here didn't raise an issue, a triable issue in response to the showing made by the government

as to the assignment of Mr. Becker as her supervisor, and so the government is entitled to summary judgment on that aspect of her claim on that theory.

The government suggests that that ruling opens the door to allowing people to make complaints and then not pursuing them, and I think the government is correct; it does. The fault there, however, is not with the grieving party. It's with the regulations which allow such looseness to be pursued.

I am sympathetic with the situation in which Mr. Yeck found himself. From the undisputed record here, it is quite clear that Ms. Pueschel was a frequent visitor to his office, and it was, as is suggested, very difficult to determine whether she was lodging a complaint under 1614-.105 or whether she was complaining in the general sense of the word.

Unfortunately, the way these regulations are written, it was up to Mr. Yeck to assume that she was making a contact and an act within the time frames required and give her notice under subsection (d) that there wasn't going to be anything done or there wasn't anything to it or that he didn't consider it as a complaint. It's unfortunate that the regulations are written in that way, but that is a result of the regulations, and this Court certainly has no power to reconfigure those regulations.

[65] That brings me then to the substance of the Title VII aspects of the claims of Ms. Pueschel on the alleged destruction of her records, that's what's referred to in these papers as claim 2 or allegation 2; as to the assignment of Mr. Becker as her supervisor, claim 3, and I'm going to make an alternative ruling on that; on the shift assignment, claim 4; and on the merits of the obstruction of the OWCP, that's referred to as claim 5 in this package.

Now to prevail under Title VII, Pueschel must prove that she's a member of a protected claim, that she was affected by an adverse personnel action, and that the circumstances of the action give rise to an inference of unlawful discrimination. If she's successful in doing that, the burden then shifts to the government to rebut the presumption by producing evidence that its actions were based on legitimate and nondiscriminatory reasons.

If the plaintiff—excuse me, if the defendant does that, then the presumption in favor of the plaintiff is destroyed, and in that instance, the burden, it is incumbent upon the plaintiff to show that the reason given was pretext; that is, she must show that it was false and that discrimination was the real reason for the challenged personnel action. That analysis applies to claims of retaliation as well.

Now the government asserts that none of these actions here constitute adverse personnel actions. The law in this [66] circuit on that topic is *Page v. Bolger*, 645 P.2d 227. It is also augmented by decisions in Maryland recently, Caussaed or "Caussaed," C-a-u-s-s-a-e-d, v. Brown, a 924 F.Supp. 693, a 1996 decision; and it was affirmed by an unpublished decision of the Supreme Court—I mean, of the Fourth Circuit in February of 1997 on the reasoning of the district court. Also instructive on that point is the decision in *Howze v. Virginia Polytechnic* and *Green v. Fairfax County School Board.*

In *Page v. Bolger*, the Fourth Circuit held that under the statute here at issue, which is section 717, the question is whether there's been discrimination in respect of personnel actions affecting covered employees or applicants for employment, and that court noted that the issue there has been focused on ultimate employment decisions, such as hiring, granting leave, discharging, promoting, and

compensating, and that that's what's contemplated by the term "personnel actions."

The Fourth Circuit also said that it was not supplying a general test for defining what were, as it referred to, ultimate employment decisions, which should be held directly covered by section 717 and comparable antidiscrimination provisions of Title VII. It did note that among the myriad decisions being taken at all levels and with various degrees of significance in employment contexts, there were certain other kinds of decisions other than the kind they referred to that would constitute personnel acions or adverse personnel actions [67] or ultimate employment decisions within the meaning of its holding in *Page*.

It also observed that on the other hand (there were many interlocutory or immediate decisions, in the words of the court, that had no immediate effect upon employment conditions which were not intended to fall within the direct prescriptions of section 717 as adverse personnel actions, as well as comparable provisions of Title VII, and they said that the test in this circuit is to look at the circumstances and look at the immediate decisions and find out from the facts what kind of decision it was and then apply the rule.

More recently in the *Caussaed* case, it's been held in the District of Maryland in a case involving a transfer that there had to be some indication of a decrease in wage or salary, a demotion, a less-distinguished title, or material loss of benefits to make it significantly diminished material capacity responsibilities or other indices that, of course, might be unique to a particular situation which show a material adverse change in any employment situation, as opposed to a mere inconvenience or an alteration of job responsibilities.

Now applying the rule in those decisions, I recognize there's a decision such as those in *Hayes v. Shalala* from the D.C. District Court and the other cases that are referred to and cited in the *Shalala* decision that say that Hayes really shouldn't—that *Page v. Bolger* is not the law in other [68] circuits, and that may be true. I don't question Judge Friedman's analysis in *Hayes v. Shalala* with respect to whether it's the law in the D.C. Circuit, but the law that applies here is the law of the Fourth Circuit. And I, frankly, think were I confronted with the matter as a matter of initial impression, that I certainly would myself agree with the articulation of the test as established by the Fourth Circuit.

And this case is proof positive why that ought to be the case, because we have here really quite remarkable actions. There's the alleged destruction of records, which the undisputed record here is now that didn't occur. There was a miscommunication, and all of a sudden, because there was the failure to have to resolve this in the context other than litigation, it became the basis for litigation, and it wasn't an adverse personnel action at all. It was at best a miscommunication about what was the status of the plaintiff's records.

The assignment of a supervisor is not an adverse employment action. It has to be—there has to be something that happens as a consequence of the assignment of the supervisor before there's an adverse personnel action, and the plaintiff here has been unable to point to anything that happened except the possibility that Mr. Becker, who was identified as among the people who were on the team that some ten years before this assignment of him as her second-level supervisor here had been [69] involved in what was considered to be sexual harassment, that Mr. Becker told her that before getting sick leave, she had to get some information together.

Well, given her history about the amount of time she'd been off work over the years as shown in this record, there's not even anything suspect about requiring collecting medical information as a pre-condition to granting sick leave. That's not even remotely discriminatory or retaliatory.

The other thing she points to is the shift change, and I'll deal with that in a minute, but neither of those constitute actions by Becker which would constitute an adverse personnel action at all, and so her claim fails in that respect as well.

Claim 5, the obstruction of the OWCP claim, it is really quite difficult to study the record and discern truthfully fully or, excuse me, and to discern accurately what that claim is really all about, but it seems to boil down to the fact that somehow she thinks her claims over time were processed somewhat differently than those of other people, and she blames this largely upon what can accurately be described as the incompetence of some of the people processing it, notably, a Ms. Carey. If it's incompetence, that's unfortunate, but it's not discrimination.

Beyond that, the record here is, as shown by the government, that her claim, Ms. Pueschel's claim wasn't processed any differently than anybody else's, and there is no evidence of [70] any, that it was processed any differently, that her claim was processed any differently than anybody else's claim was.

In fact, what appears from the record is a right fulsome processing of her claims, and it's quite difficult for me to understand how that, there's any merit to that claim at all, and the government has carried its burden. She hadn't carried hers. So the government is entitled to summary judgment on the discrimination claim on that basis.

Now this claim about the shift harassment is an example of what I consider to be a frivolous claim. It is remarkable to me. It's frivolous in two ways. It's frivolous as a discrimination claim, and it's frivolous as a Rehabilitation Act claim.

The undisputed record here is that she was given special shift assignments from 1991 on; that in 1993 to '94, her shift was 6:00 a.m. to 4:00 p.m.; that in 1994, there was a proposed change from 8:00 a.m. to 6:00 p.m.

There was a strangely worded letter from her doctor which pressed here left the following undisputed testimony that she has to live with, and that is that there's not a thing wrong with her having a shift from 8:00 a.m. to 6:00 p.m. when he understood what it was all about. Now this was posted in November of '93, and the first thing the plaintiff did was take off for three weeks.

The people who were making the shift changes were union [71] people, and people with the FAA were involved. They gave her a chance to talk about this, and she refused even to talk to them about it and then fired off a complaint that she somehow had been discriminated against or that she hadn't been given a reasonable accommodation.

The shift change, according to the undisputed record here, did not involve any diminution of title or pay or grade or level of responsibility or under any other unique circumstances do, change any condition of employment, and therefore, it's not an adverse personnel action.

She argues that she was treated differently than Mr. Borkholder. The record is Mr. Borkholder and she both got special shifts. They got both treated the same. They didn't get treated different.

It's rather disingenuous to suggest that she had to go to the flight surgeon and he didn't, and the only reason she went to the flight surgeon was because she rejected the special treatment she was given and he accepted his, and that's a distinction without a difference.

Quite frankly, it wasn't an adverse employment action. It was an accommodation to her, because it was favorable. In fact, there's not any real difference between what happened to her in this shift assignment, and the transfer in the cases that deal with transfer as in, cited in the *Caussaed* decision certainly would lead to the same result here.

[72] Now with respect to the claim for summary judgment under the Rehabilitation Act, the plaintiff, according to *Doe v. University of Maryland Medical Systems Corp.*, has to establish to make a prima facie case a violation of the claim under the Rehabilitation Act that she has a disability within the meaning of the statute, that she is otherwise qualified for the employment, and that the FAA took action against her solely because of her disability.

Now a qualified individual with a handicap is defined in the regulations to mean an individual with handicaps who with or without reasonable accommodation can perform the essential functions of the position in question without endangering the health and safety of the individual or of others. And the government—the act, of course, requires the government, like all employers, to make reasonable accommodations to any known physical or mental limitations of a qualified employee unless it would impose an undue hardship on the agency.

Now let us assume for the moment that her medical condition constitutes a handicap under the act. Then it

would find she's not qualified for the position, because her physician stated in April 1994 that she's not been qualified to work and she's not returned to the position, and so she can't now be heard to contend that she can't return to work. She was arguing that position in the OWCP and arguing another position in this situation, and she can't have it both ways. That's not right. [73] And beyond that, not being right, it's not permissible at law.

Now the government did offer her an 8:00 a.m. to 6:00 p.m. schedule, and the record here shows that it is a reasonable accommodation on its face, because her own doctor has testified here that it was something she could do and that it's not medically necessary to change that shift once he understood what the parameters were with the appropriate times off and so forth. It modified her work schedule to stabilize her environment, and the mere fact that it didn't give her the exact schedule requested, absent some medical proof that this was absolutely necessary to continue her employment, could not rise to the level of refusing a reasonable accommodation.

More importantly, if the Rehabilitation Act is to work, the reasonable accommodation issue has to be an interactive process, and that's manifested in the regulations which so provide at 29 C.F.R. Part 1630. And what appears beyond any question in dispute here is that the plaintiff completely on her own stopped the interactive process by refusing to talk with those who were making the decisions.

And where, as here, the breakdown in the interactive process is on the plaintiff, then it is the plaintiff who bears the consequence of failing to provide the—or of the failure of the interactive process to result in what she continues to be, an accommodation that is reasonable.

That is the teaching, meaning, and holding of *Beck v. The University of Wisconsin Board of* [74] *Regents.*

As I said, this case, in my judgment, lacks merit for the reasons I've said. There isn't any way any reasonable jury could return a verdict in favor of the plaintiff on any of the theories that are being propounded under either Title VII or the Rehabilitation Act, and for that reason, the defendant's motion for summary judgment is granted, and the action will be dismissed with prejudice. An order will be issued that says for the reasons set forth on the record today, the motion is granted and the action is dismissed with prejudice.

Is there anything else that needs to be done in this case at this time?

MR. SZYBALA: No, Your Honor.

MR. CHUZI: No, Your Honor.

THE COURT: All right, we'll be in adjournment.

(Which were all the proceedings had at this time.)

APPENDIX C

[DoL Logo]

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
Division of Federal Employees' Compensation
Washington, D.C. 20210

December 10, 1998

(202) 693-0045

File Number: 25-0298151
Date of Injury: 01/01/1980
Employee: DEBORAH K. PUESCHEL
Social Security Number: 213-56-5622
Date of Birth: 01/09/1952
CSA Number:

DEBORAH K. PUESCHEL
10135 GATE PKWY APT 1907
JACKSONVILLE, FL 32246

Dear Ms. PUESCHEL:

This letter outlines your entitlement to compensation benefits and your responsibility to return to work in connection with the injury identified above.

PAYMENT OF COMPENSATION

The Office of Workers' Compensation Programs (OWCP) will pay you compensation benefits under the conditions set forth below.

Weekly rate of pay used to compute gross compensation: $1611.51

Percentage of rate of pay: 75% (one or more dependents)

Cost-of-living adjustments have increased your gross weekly compensation to: $1299.00

First Payment		Regular Payment	
For Period From	05/15/1994	For Period From	12/06/1998
To	12/05/1998	To	01/02/1998
Net Amount:	$42704.55	Gross Amount:	$5196.00
Health Benefits:	$ 0.00	Health Benefits:	$ 113.16
Basic Life Ins:	$ 0.00	Basic Life Ins:	$ 0.00
Post-Retirement		Post-Retirement	
Basic Life Ins:	$ 0.00	Basic Life Ins:	$ 0.00
Optional Life Ins:	§ 0.00	Optional Life Ins:	$ 0.00
Net Amount:	$42704.55	Net Amount:	$5082.84

If you have optional life insurance and/or health benefits coverage but no deduction for it is shown above, contact this office immediately. You are still responsible for these premiums.

US DEPT OF TRANSPORTATION
CTP: ATTN: AEA-14.1
FEDERAL AVIATION ADMIN
EASTERN REGION
JFK INTL AIRPORT
JAMAICA NY 11430

cc: George Chuzi

RECOVERY AND RETURN TO WORK

Acceptance of your claim and payment of compensation do not change your employment status with your employing agency. Unless your agency has told you otherwise, you are still its employee and subject to its personnel rules:

Compensation benefits for total disability are payable only while you cannot perform the duties of your regular job because of your injury at work. The Federal Employees' Compensation Act (FECA) is not a retirement program, and you are expected to return to work (including light duty or part-time work, if available) if you are no longer totally disabled because of your injury. The FECA provides that a partially disabled employee shall be paid compensation based on the difference between the monthly pay and the employee's wage-earning capacity, as determined by the employee's actual earnings or by the OWCP.

1. If you have not done so, ask you employing agency whether light or limited duty work is available for partially disabled employees, and whether your usual job can be changed to meet your work limitations due to the injury.

If the answer to either of these questions is yes, ask your physician whether and when you will be able to perform these duties. Once you can perform light or limited duty, you should report to your agency seeking such duty.

2. If you receive an offer of light or limited duty from your agency, advise the OWCP in writing of your decision either to accept or refuse the position offered at the time that you notify your agency. Refusal by a partially disabled employee to seek, accept, or con-

tinue suitable work is lawful grounds for the reduction or termination of compensation.

3. If the OWCP learns that you have earnings equal to or higher than the wages being paid for the job you held when injured, the OWCP will terminate your compensation benefits without notice.

OTHER IMPORTANT INFORMATION

The enclosure to this letter (EN1049) contains other important information about your compensation payments. After you have read it, sign one copy of the certification and send it to this office.

If you have any questions concerning your claim, contact this office at the address or telephone number noted above.

Sincerely,

/s/ Roberta F. Mosier
ROBERTA F. MOSIER
Special Examiner

Enclosure(s): EN1049

OTHER IMPORTANT INFORMATION

Read the following information carefully, and keep it for future reference. If you have questions, contact this office at the address or telephone number shown on the front of this letter.

1. HOW COMPENSATION IS PAID. Compensation benefits are paid each four weeks. The OWCP approves the payment and the Treasury Department issues it. Your first payment will be sent within 15 days. Regular payments will be dated the last day of the four-week period for which payment is made. DO NOT file claims unless you are asked to do so.

2. DELIVERY OF PAYMENT. If you do not receive a payment within 10 days after it is due, notify the OWCP at the address shown on the front of this letter. In the letter, include your file number, your address (with ZIP code), and the amount of the payment. Your signature must appear on the letter.

3. DIRECT DEPOSIT. If you are not yet receiving your payments by electronic fund transfer (EFT or direct deposit), please so advise the OWCP. We will then send you a sign-up form for direct deposit (you may also be able to obtain one from your bank).

4. CHANGE OF ADDRESS. If you change the address used for your payments, notify the OWCP at the address shown on the front of this letter. In the letter, include your file number, the old address, and the new address (with ZIP code). Your signature must appear on the letter. Also, promptly advise the OWCP of any change in your mailing address, if different from the check address.

5. CHANGE IN STATUS OF DEPENDENT. If you have one or more dependents, and the status of any dependent changes, notify the OWCP at the address shown on the front of this letter. In the letter, include your file number, the name of dependent whose status changed, the effective date of the change, and the nature of the change in status. Your signature must appear on the letter.

If you claimed only one dependent, DO NOT CASH CHECKS RECEIVED AFTER THE CHANGE IN STATUS of this dependent. Otherwise, an overpayment of compensation may result. Return the checks promptly to this office.

6. RETIREMENT BENEFITS. You must report to the OWCP any retirement income you receive from any Federal agency. This is because a person who receives compensation benefits under the FECA is not permitted to receive benefits under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS).

If you are covered under FERS, the OWCP must deduct from your compensation entitlement at least part of any Social Security Retirement benefits to which you are entitled based on age. This is because a portion of FERS benefits is included in Social Security retirement benefits. Therefore, advise the OWCP immediately upon filing for or receiving Social Security Retirement benefits.

7. OTHER COMPENSATION AND DISABILITY BENEFITS. If you have filed for or receive other compensation or disability benefits (for example, black lung benefits or veterans' benefits) from any Federal agency, advise the OWCP of the name of the Federal agency and the nature of the disability involved.

8. RETURN TO WORK. Advise the OWCP if you return to your former job. If you obtain other work, either with your original employing agency or with another employer, submit the following information to the OWCP at once:

A. Name and address of employer

B. Date you returned to work

C. Type of work you are performing

E. Your weekly pay rate

D. Number of hours worked per week

Your pay rate should include not only cash wages, but also "wages in kind", such as housing, meals, clothing, and reimbursable expenses. If you are self-employed (for example, as a farmer or a store operator), you must report as your pay rate what it would have cost you to hire someone else to do the same work.

9. OVERPAYMENTS. To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATEY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the OWCP that you are working.

NOTICE TO EMPLOYEES COVERED BY THE CIVIL SERVICE RETIREMENT SYSTEM

Disability compensation payments under the FECA are temporary in nature. If the OWCP reduces, further reduces, or terminates your compensation payments, you may wish to elect retirement benefits in the future. In the event of your death, compensation is not payable to

your survivors unless they can establish that your death resulted from the accepted job-related medical condition.

The Office of Personnel Management (OPM) administers the Civil Service Retirement System. The OPM has asked us to remind you that *if you remove your contributions from the Retirement Fund, you lose all entitlement to a Civil Service annuity and your survivors lose all entitlement to a Civil Service survivorship annuity.*

If you have any questions about the consequenecs of taking a refund of your retirement contributions, contact the Office of Personnel Management, Compensation Group, Retirement Operations, Washington, D.C. 20415.

CERTIFICATION

I have read the information contained in EN1049 and understand the conditions under which I may receive compensation and the items I must report to the Department of Labor, Office of Workers' Compensation Programs, in connection with my claim. I agree to be bound by these conditions.

I understand that willful failure on my part to comply with these conditions can result in termination or forfeiture of benefits and liability for resulting overpayments. I also understand that any falsification or willful omission may result in criminal prosecution.

_____ _____

Signature (in ink) Date

APPENDIX D

[DoL Logo]

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers Compensation Programs
Division of Federal Employees Compensation
Washington, D.C. 20210

File Number: 25-0298151

[Sep. 23, 1998]

Deborah Katz Pueschel
10135 Gate Parkway Apt. 1907
Jacksonville, FL 32246

Dear Ms. Pueschel:

After a thorough review of your case files, compensation for leave without pay for periods after April 5, 1994 is being approved. This decision is not based upon vacating the previous denials in your April 5, 1994 injury claim, but rather, a finding that disability after that date was related to your previously approved claim under case file 25-0298151.

Accordingly, payment is being approved as follows, based on the pay rate in effect as of April 5, 1994:

Weekly rate of pay: $72,797 per annum / 52 =	$1399.94
Operational differential: $139.52 per pay period/2 =	69.76
Sunday premium pay: $174.40 per pay period/2 =	87.20
WEEKLY TOTAL	$1556.90

Your rate of pay also included holiday pay, but since this was not a regular amount, we must obtain the year prior

amount of holiday pay from your employer. After the information has been received, an adjustment will be made. Compensation is computed at ¾ of your pay rate, due to your spouse. For purposes of the past periods of compensation being claimed, please advise of the date of your marriage.

The following cost-of-living increases have been applied:

2.5% effective 3/1/96
3.3% effective 3/1/97
1.5% effective 3/1/98

Compensation for the following periods is being paid:

5/23/94 - 5/25/94	$700.61
5/29/94 - 12/24/94	$35,030.40
2/18/95	$11.68
2/19/95 - 7/19/98	$214,858.93
TOTAL:	$250,601.62

Withholdings for health benefits plan 105 have been made for the periods 5/29/94 - 12/24/94 and 2/19/95-7/19/98, bringing the net total payment to $245,346.36. You may expect to receive a check in this amount shortly.

To claim compensation for periods after 7/19/98, please complete the enclosed form CA-8 and submit it through your employer.

Your employer is being saked to clarify your pay status for the period 4/5/94 - 5/20/94, as we have conflicting information.

Claims for compensation for periods prior to 4/5/94 are still pending, as is your request for reconsideration on case file 25-438017. I will address these issues in separate correspondence.

Per our telephone conversation, a copy of the leave analysis provided by the FAA as an attachment to your February 1, 1998 CA-7 is enclosed.

Sincerely,

/s/ Roberta F. Mosier
ROBERTA F. MOSIER
Special Examiner

Enclosures

Cc: FAA
Atty Chuzi

APPENDIX E

[Excerpt from Court Transcript Dated July 7, 1997]

CROSS EXAMINATION

[33] BY MR. CHUZI:

Q Dr. Callaway, I'm just going to—I have about three questions and I just want to circle back. Mr. Szybala asked you several questions about the difference between a 6 a.m. to 4 p.m. shift and an 8 a.m. to 6 p.m. shift.

If the 8 a.m. to 6 p.m. shift involved more stress on Ms. Katz because air traffic is heavier at 6:00, would that be a factor in your assessment as to whether 6 to 4 is more or less beneficial than 8 to 6?

A I think there are two factors. One is the issue of stress and multiple evaluations by difference physicians. Everyone had urged that she reduce this as much as possible. We haven't talked about all the conditions and labels and the diagnostics—diagnoses that she had, one of which was fibromylagia which is a descriptive label, and certainly that is worse with stress. That's, you know, an issue about which I don't have first-hand information. But anything that increased stress would be more hazardous.

The other issue is the issue of changing shifts back and forth and changes by two hours in the time you get up or go to bed will have adverse affects temporarily until you readjust.

* * * *

[44] Q Well, what do you think about right now?

A I think right now she's certainly capable of work. She's probably, she's probably capable of air traffic control work right now except for the fact that believe she's still on some medication that would be disqualifying. And she's certainly capable of administrative work of any capacity.

Q She is capable of administrative work?

A I mean, I—as far as I'm concerned, none of her physical conditions right now preclude her from, from working in any capacity. She's well enough to work.

Q When, when did you reach that conclusion?

A Just now. I mean, this is the first time I've been asked.

Q Well, you said that you had been asked to write this note by Ms. Katz I take it.

A Right.

* * * *

APPENDIX F

BRIAN C. TURRISI, M.D., F.C.C.P.
Pulmonary and Internal Medicine
1601 18th Street, N.W.
Washington, D.C. 20009
(202) 667-0134

November 1, 1995

Federal Aviation Administration
U.S. Department of Transportation
852 East Market Street
Leesburg, VA 22075

Re: Deborah Katz-Pueschell

To Whom It May Concern:

I am Ms. Katz-Pueschell's internist and pulmonary specialist and I have been treating her for the last few years for sarcoidosis and asthma. I am also an aviation medical examiner who is quite familiar with the medical requirements for air traffic controllers. You have recently received correspondence from Dr. Steven J. Rojcewicz, who is Ms. Katz-Pueschell's psychiatrist. I have read his assessment of her case dated October 31, 1995, and I completely agree. Although from an objective perspective her asthma and sarcoidosis have improved to some degree, her anxiety disorder makes the reexacerbation of these disorders totally unpredictable. On this basis the patient would be medically disqualified from an aviation medical examiner's perspective for an active position as an air traffic controller.

If I can be of any further help or assistance, please do not hesitate to contact me.

Sincerely yours,

/s/ Brian C. Turrisi, M.D.
BRIAN C. TURRISI, M.D.
AME No. 16871-1
BCT/bj

APPENDIX G

BRIAN C. TURRISI, M.D.
1901 - 16TH STREET, N.W.
WASHINGTON, DC 20009
(202) 667-0134 DEA # AT 6981513

NAME Dasarah KATZ AGE

ADDRESS DATE 4/6/94

℞

Due to Physical & mental problem at the patient's Employment She is NOT released for ANY work at the time & until further notice

Refill ____ times

(Signature)

To ensure brand name dispensing, prescriber must write "Brand Necessary" on the prescription.

M7002910

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
JUL 19 1999
OFFICE OF THE CLERK

(2)

No. 98-1864

In the Supreme Court of the United States

DEBORAH KATZ PUESCHEL, PETITIONER

v.

RODNEY E. SLATER, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
MARLEIGH D. DOVER
FRANK A. ROSENFELD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1078

QUESTION PRESENTED

Whether the court of appeals properly rejected petitioner's claim under the Rehabilitation Act because the uncontradicted record, including her own physician's statements, shows that she is unable to perform her job as an air traffic controller.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Berkemer v. *McCarty*, 468 U.S. 420 (1984)	8
Cleveland v. *Policy Management Sys. Corp.*, 119 S. Ct. 1597 (1999)	4, 5, 6
Doe v. *University of Md. Med. Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995)	4
United States v. *Lovasco*, 431 U.S. 783 (1977)	8

Statutes and regulation:

Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*:	
42 U.S.C. 12111-12117	5
42 U.S.C. 12111(8)	5
42 U.S.C. 12201-12204	5
42 U.S.C. 12210	5
Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*	3
Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.*	2
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*	3
29 U.S.C. 791(g)	5
29 U.S.C. 794(d)	5
29 C.F.R.:	
Section 1614.203(a)(6)	4
Section 1614.203(g)	7

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) and the decision of the district court (Pet. App. 6a-18a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1999. The petition for a writ of certiorari was filed on May 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was an air traffic control specialist employed by the Federal Aviation Administration (FAA). Petitioner suffers from respiratory impairments, including asthma and sarcoidosis, conditions which she alleges are made worse by stress. Pet. App.

2a. From 1991 to 1994, for medical reasons, petitioner was assigned only day shifts, beginning at 6 a.m., 7 a.m., or 8 a.m., with her shifts for the period of April 1993 to April 1994 set at 6 a.m. to 4 p.m. *Id.* at 15a; see also C.A. App. 391. In November of 1993, the team of FAA and union representatives that set work schedules proposed that, as of April 1994, petitioner change to an 8 a.m. to 6 p.m. shift. Pet. App. 2a, 15a; see also C.A. App. 252-253. Petitioner objected to that change, which she asserted would be more stressful and would thus worsen her medical condition. Pet. 4. On April 5, 1994, asserting that the stress of the dispute over her shift prevented her from working at all, petitioner went on leave. C.A. App. 385; Pet. App. 2a. The next day, her physician, Dr. Turrisi, submitted a note stating: "[d]ue to physical & mental problems at the patient's [e]mployment she is NOT released for ANY work at this time & until further notice." Pet. App. 34a. On the basis of that physician's report, petitioner sought workers' compensation benefits under the Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.*, but the Office of Workers' Compensation Programs of the Department of Labor (OWCP) denied her claim. See C.A. App. 383-386. Petitioner has not returned to work since she went on leave in April 1994. Pet. App. 2a.[1]

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[1] We have been advised that, on September 9, 1998, the FAA notified petitioner that it planned to remove her from her position as an air traffic controller. On September 23, 1998, OWCP notified petitioner that it had approved workers' compensation benefits for her retroactively to April 5, 1994, based on a disability claim that she had submitted *before* the April 1994 incident. Petitioner was removed from her air traffic controller position effective January 15, 1999, but she continues to be eligible for workers' compensation benefits.

2. Petitioner brought an action in district court against the Secretary of Transportation in which she alleged that the FAA had violated her rights under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, by, among other things, its failure to allow her to retain her 6 a.m. to 4 p.m. shift. The district court, characterizing the claim as "frivolous," Pet. App. 15a, granted summary judgment to the Secretary. *Id.* at 15a-18a.

In its oral opinion, the court assumed "that [petitioner's] medical condition constitutes a handicap under the [Rehabilitation Act.]" Pet. App. 16a. The court concluded, however, that petitioner is not qualified for her position, a prerequisite for her to bring a claim under the Act, "because her physician stated in April 1994 that she's not been qualified to work and she's not returned to the position." *Id.* at 17a. The court explained that petitioner, contending that she was unable to work, had applied for workers' compensation benefits, "and she can't have it both ways. That's not right. And beyond that, not being right, it's not permissible at law." *Ibid.* The court further held that the offer of an 8 a.m. to 6 p.m. shift was "a reasonable accommodation on its face, because her own doctor has testified here that it was something she could do," and there is no "medical proof that [a 6 a.m. to 4 p.m. shift] was absolutely necessary to continue her employment." *Ibid.* Moreover, the court concluded, petitioner "completely on her own stopped the interactive process by refusing to talk with those who were making the decisions," and, thus, she "bears the consequence * * * of the failure of the interactive process to result in * * * an accommodation that is reasonable." *Ibid.*[2]

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[2] Petitioner also raised several claims under Title VII, of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on matters

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-5a. The court noted that petitioner's physician had written in 1994 that she was unable to work and she has not since given notice that she is available for work. *Id.* at 5a. "The evidence establishes," the court concluded, "that at the time [petitioner] brought the action and throughout the litigation, her illness precluded her from working as an air traffic controller." *Id.* at 5a. The court therefore rejected petitioner's Rehabilitation Act claim because, "[i]n short, she is not 'otherwise qualified for employment.'" *Ibid.* (quoting *Doe* v. *University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995)); 29 C.F.R. 1614.203(a)(6).

ARGUMENT

Petitioner asserts (Pet. 7-11) that the court of appeals' decision should be reversed and the case remanded in light of *Cleveland* v. *Policy Management Systems Corp.*, 119 S. Ct. 1597 (1999), which was pending in this Court when she filed her petition and has since been decided. Nothing in *Cleveland*, however, calls into question the reasoning or result of the court of appeals in this case. Petitioner otherwise raises only factual disputes that do not warrant this Court's review.

1. In *Cleveland*, this Court held that an application for Social Security Disability Insurance (SSDI) benefits does not create an estoppel or "special legal presumption" against the applicant when she seeks to argue, in

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such as the alleged destruction of certain personnel records and the assignment of a particular person as her supervisor. The district court granted summary judgment to the Secretary on each of those claims, and the court of appeals affirmed. Pet. App. 2a-4a, 10a-16a, 18a. Petitioner does not renew those claims in this Court.

support of a claim under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111(8), that she is able to perform the essential functions of her job with or without a reasonable accommodation. 119 S. Ct. at 1603. "Nonetheless," the Court concluded, "in some cases an earlier SSDI claim may turn out genuinely to conflict with an ADA claim. * * * [W]e hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation." *Ibid.*

Petitioner incorrectly suggests that the court of appeals here diverged from the analysis that this Court adopted in *Cleveland* and held that petitioner's Rehabilitation Act claim was barred either because she applied for workers' compensation benefits (Pet. 7-9) or because of statements she made in support of her application (Pet. 9-11).[3] The court of appeals did not apply estoppel or any special presumption based on petitioner's application or any statements that she made in support of that application. Rather, consistent with *Cleveland*, 119 S. Ct. at 1603-1604, the court of appeals applied ordinary summary judgment principles. It examined the evidence of record in the Rehabilitation Act case and found it undisputed that petitioner has been unable to work as an air traffic controller since April of 1994. Pet. App. 5a.[4]

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[3] The Rehabilitation Act operates under the same standards that apply under the ADA. See 42 U.S.C. 12111-12117, 12201-12204, 12210; 29 U.S.C. 791(g), 794(d).

[4] The district court remarked that petitioner's claim that she is qualified for her position as an air traffic controller is contrary to the position she took before the Department of Labor and that "she can't have it both ways. That's not right. And beyond that, not being right, it's not permissible at law." Pet. App. 17a. That

In its discussion, the court of appeals relied on the April 1994 statement by petitioner's own doctor that she is unable to work due to her medical condition, a statement that the court of appeals found "uncontradicted" by other evidence in the record. Pet. App. 5a. The court of appeals did not give preclusive effect or special weight to that representation or to any other representations made by petitioner in the workers' compensation claim. Rather, the court concluded that, absent any other explanation in the record, the medical report establishes that petitioner is unable to work as an air traffic controller and thus is not otherwise qualified to perform her prior position. As a result, the court denied her claim. *Ibid.* That reasoning is consistent with this Court's holding in *Cleveland* that an ADA claimant must explain statements that appear to negate an essential element of her claim. See 119 S. Ct. at 1603.

2. Whether the court of appeals erred in holding that the medical evidence conclusively shows that petitioner cannot perform her job is a fact-bound question that does not merit this Court's review. At any rate, petitioner fails to make a persuasive case that the court was mistaken. She reproduces in the petition's appendix three statements made by her doctor, but those statements do not suggest that she has been able to perform as an air traffic controller at any time since

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aspect of the district court's reasoning is inconsistent with this Court's opinion in *Cleveland*, but the court of appeals did not adopt or endorse that rationale in its opinion. Indeed, that rationale was not even critical to the conclusion of the district court: its principal reason for rejecting petitioner's claim was that petitioner had unilaterally caused the breakdown of discussions over a reasonable accommodation (*ibid.*), a rationale which the court of appeals also did not address.

April 1994. Pet. App. 30a-31a, 32a-33a, 34a. Dr. Turrisi's original handwritten note of April 6, 1994, states that "[s]he is NOT released for ANY work at this time & until further notice." Pet. App. 34a. His report of November 1, 1995, explains that her disorders are "totally unpredictable. On this basis the patient would be medically disqualified from an aviation medical examiner's perspective for an active position as an air traffic controller." *Id.* at 32a. Even in his testimony of July 7, 1997, Dr. Turrisi states that "she's probably capable of air traffic control work right now except for the fact that [I] believe she's still on some medication that would be disqualifying." *Id.* at 31a. Those statements contradict petitioner's claim in the district court and court of appeals that she could perform her job if she worked a 6 a.m. to 4 p.m. shift.

Indeed, in this Court, petitioner hardly seems to dispute that she cannot perform her job as an air traffic controller. See Pet. 9-10. She argues instead that Dr. Turrisi testified that "she's certainly capable of administrative work," Pet. App. 31a, and that the FAA was therefore obligated to offer her an administrative position in lieu of her prior air traffic controller's position. See Pet. 10.

That reassignment claim, however, is wholly unrelated to the *Cleveland* issue on which petitioner purports to base her petition for certiorari. Moreover, the claim involves no issue of general importance but only the application of settled law to the specific facts of petitioner's case.[5] In any event, the claim is not properly

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[5] Regulations under the Rehabilitation Act give an employee the right to seek a transfer to a different position for which she is qualified, but only if such a position is vacant. See 29 C.F.R. 1614.203(g). As we explain in the text following this note, peti-

before this Court because petitioner did not raise it in the court of appeals and that court did not pass on it. See *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Indeed, to the best of our knowledge, petitioner did not previously make any request for reassignment to an administrative position, either to the FAA, the Office of Workers' Compensation Programs, or the district court. Nor are we aware of any evidence in the record showing that there is any open, available administrative position to which she could be transferred. Petitioner offers only the stray remark of Dr. Turrisi to establish that there is any genuine issue of fact over a possible reassignment. Thus, petitioner's claim does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1999

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tioner does not identify any evidence in the record showing that such a position exists.

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No. 98-1864

IN THE
Supreme Court of the United States

DEBORAH KATZ PUESCHEL,
Petitioner,

v.

RODNEY E. SLATER, SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The district court granted summary judgment for respondent on petitioner's claim under the Rehabilitation Act, on the ground petitioner was simultaneously arguing that she was disabled and that she wanted to work with accommodation. According to the district court, "she can't have it both ways. That's not right." Pet. App. 17a. The court of appeals affirmed. Petitioner has applied for a writ of certiorari for the purpose of vacating and re-

manding to the court of appeals in light of this Court's subsequent decision in *Cleveland v. Policy Management Systems Corp.*, 119 S.Ct. 1597 (1999). That decision held that because "there are too many instances in which" claims of disability and requests for accommodation "can comfortably exist side by side", there should not have been a negative presumption such as that applied in this case by the district court. *Id.* at 1602.

2. Respondent concedes that this "aspect of the district court's reasoning is inconsistent with this Court's opinion in *Cleveland*". Opp. at 5-6 n.2. However, respondent argues that this reasoning was not critical to the district court's decision and that the court of appeals did not specifically endorse it. *Id.*

3. Respondent's concession that the district court's reasoning has been overruled by intervening events is a fundamental basis for vacation and remand. *See Lawrence v. Chater*, 116 S.Ct. 604, 607-607 (1999).

4. Upon remand, the court of appeals would have to give petitioner the opportunity to explain the apparent inconsistency between her claim of disability and her claim for accommodation. At that point, the court of appeals would also have to remand to the district court, to consider for the first time whether respondent owed petitioner a duty under the Rehabilitation Act to assign her to another vacant position, consistently with her doctor's indications that she was capable of performing other duties with no difficulty. Pet. App. 32a, 31a. The district court and court of appeals never addressed these questions on the mistaken belief, now overruled, that petitioner's assertions of disability precluded her from claiming protection as a "qualified individual with handicaps". Pet. App. 5a.

5. Respondent further argues that there is no basis for a remand, because petitioner's claim that she should have been accommodated under the Rehabilitation Act involves "only the application of settled law to the specific facts of [her] case." Opp. at 7. Respondent also argues that the issue raised by petitioner "is a fact-bound question that does not merit the Court's review". Opp. at 6. Without question, the application of *Cleveland* to the facts of this case is a matter for the lower courts in the first instance. The necessary review by the lower courts can only be obtained through vacation and remand.[1]

CONCLUSION

Petitioner requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

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[1] Respondent also suggests that to the extent petitioner claims assignment to another position as part of her accommodation, she has failed to identify any such position and the issue was not addressed by the court of appeals. Opp. at 7-8 & n.5. It is beyond dispute, of course, that petitioner repeatedly requested accommodation under the Rehabilitation Act; petitioner cannot be denied review solely because of the lower courts' mistaken holding that she was not entitled to accommodation because of her disability. Pet. App. 5a. Moreover, as demonstrated by the applicable regulations, Petition at 2-3, the burden of proof with respect to other positions falls on respondent, the party with access to this information; the absence of evidence on an issue typically is held against the party which bears the burden of proof on that issue.